

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

ADREA HILL, and
LUKE SANNER,
Plaintiffs,

Court Address and Phone:
Allegan County Building
113 Chestnut Street
Allegan, MI 49010
(269) 673-0300

v.

OTTAWA COUNTY, AND
OTTAWA COUNTY BOARD OF
COMMISSIONERS,

Assigned to Circuit Judge
Hon. Margaret Zuzich Bakker
P31035

Defendants.

Case No. 24-8010-CZ

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OPINION AND ORDER REGARDING MOTIONS FOR SUMMARY DISPOSITION

Present: The Honorable Margaret Zuzich Bakker, Circuit Judge

This case concerns a Michigan Freedom of Information Act (“FOIA”) dispute relating to a request for the private communications held by members of two Ottawa County bodies. The parties appeared on this record in this matter on February 3, 2025. Plaintiff filed a Motion for Summary Disposition under MCR 2.116(C)(10), while Defendants in responding seek the same relief under MCR 2.116(I)(2). Ultimately, the Court finds that neither party is entitled to summary disposition at this time, and that the case must proceed forward with discovery.

FACTUAL AND PROCEDURAL BACKGROUND

There are two FOIA requests that are the subject of this appeal. Each is discussed in turn.

At all relevant times for the purposes of this dispute, Mr. Lynn Johnson was a member of the Ottawa County Officers Compensation Committee. On May 28, 2024, Plaintiff Adrea Hill

made a FOIA request seeking “text messages and emails related to County business sent or received by Lynn Johnson on Thursday, May 02 from Noon until 5pm.” Ottawa County’s FOIA Officer responded with an estimated cost of \$352.79 for copies of the requested records, and requesting a payment of half of this sum as a deposit for the search. Hill disagreed with the nature of the estimated search, and asserting that these records could be obtained from Johnson’s devices. Hill explicitly stated “I recognize that he (Johnson) may be using a personal account, but because it is used for county business the communications are covered under FOIA.” The Corporation Counsel responded that “[i]n regard to your request for text messages, Lynn Johnson is not an Ottawa County employee. Any possible text messages on Mr. Janson’s phone are not public records subject to FOIA.”

Plaintiff Luke Sanner made a FOIA request seeking “copies of all ‘instant messaging’ communication (Teams, Jabber, WhatsApp, Telegram, Signal, etc.) between the following Ottawa County Commissioners on the dates of October 24, 2023 and October 25, 2023; Gretchen Cosby, Lucy Ebel, Joe Moss, Kyle Terpstra, Rebekah Curran, Sylvia Rhodea, Roger Belknap, Allison Miedema. Note that this request should include those communications found on personal devices used for county related business as well as county owned devices.” The County responded that it had no records related to this request and that “[t]he portion of your request asking for communications found on personal devices is denied in that FOIA provides for disclosure of a ‘public record’ . . . Instant messaging communications found on personal cell phones are not ‘public records’ because they were not prepared, and are not owned, used, in the possession of, or retained by Ottawa County or any board, department, commission, council or agency of Ottawa County. Mr. Sanner appealed the denial to the County Board of Commissioners, but his appeal was denied.

This lawsuit followed on those denials.

DISCUSSION

Plaintiff is the moving party. Summary disposition pursuant to MCR 2.116(C)(10) is appropriate only when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” By contrast, an (I)(2) motion may be granted if “it appears to the court that the opposing party, rather than the moving party, is entitled to judgment. . .” Under the facts as presented in this case, the Court does not believe that either party is entitled to summary disposition at this time.

A. “Public Body” FOIA Requirement.

On its express terms, FOIA is a pro-disclosure statute, and exemptions to disclosure are narrowly construed.¹ All public records are subject to full disclosure under the act unless the material is specifically exempt under an express exemption.² The act defines *public record* as “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.”³ However, this alone is insufficient; unless a writing is prepared by, owned by, used by, in the possession of, or retained by a *public body*, as defined in FOIA, MCL 15.232(h), it is not a public record, and its disclosure is not governed by FOIA.⁴ The first point of dispute between the parties is precisely whether and to what extent the County officers such as those who are the subject of these FOIA requests are themselves “public bodies” for the purposes of FOIA.

Plaintiffs argue that the Ottawa Compensation Commission and the Ottawa County Board of Commissioners are both a “public body” and that its members are public officials on the basis

¹ See, e.g., *Herald Co v City of Bay City*, 463 Mich 111, 119 (2000).

² *Swickard v Wayne Cty Med Exam’r*, 438 Mich 536, 544 (1991).

³ MCL 15.232(i).

⁴ *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 336 (1984); see also *Amberg v City of Dearborn*, 497 Mich 28 (2014) (copies of video surveillance recordings created by third parties but received by defendants are “public records”).

that the Ottawa County Officers Compensation Commission is established by the Ottawa County Board of Commissioners pursuant to an explicit grant of statutory authority. MCL 45.471. Because Lynn Johnson was appointed to the Compensation Commission in 2023 pursuant to MCL 45.472, Plaintiffs argue that his records (including his private records) are subject to disclosure. Ottawa County argues that the requested materials are not a “public record” within the meaning of FOIA because that term is defined to include only a “writing prepared, owned, used, in the possession of or retained by a public body in the performance of an official function.” Ottawa County points out that if the requested documents had been produced to Ottawa County or one of its boards, commissions, councils, or agencies “it would become a public record and it would have to be produced in response to a FOIA request...” but if not so produced, it would not be subject to disclosure. And because the substance of the FOIA denial was only for the records themselves as held by the individual officers, it is not subject to disclosure.

Under MCL 15.232, “Public body” is defined to include any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.

(iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Importantly, the Court notes that subsection *i* defines “public body” to include a “state officer”, but that subsection *iii* does not include any similar definition for county level officers. Rather, subsection *iii* states that it applies only to a “governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.” As the Court of Appeals has noted, “[w]hile FOIA includes in the definition of ‘public body’

officers and employees of state government, see MCL 15.232(h)(i), the definitional section does not also include officers and employees of municipalities such as cities or townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of 'public body.'"⁵ Thus, while the statute itself expressly contemplates that *state* officials are "public bodies", and therefore subject to FOIA, county and local officials are not. Following off of this, the Court concludes that The Ottawa County Officers Compensation Committee and the Ottawa County Commission are both "public bodies" under the plain meaning of FOIA. However, the *individual members* of those county bodies, including Lynn Johnson, Gretchen Cosby, Lucy Ebel, Joe Moss, Kyle Terpstra, Rebekah Curran, Sylvia Rhodea, Roger Belknap, and Allison Miedema, are not. Any private communications by these members can only constitute a "public record" subject to FOIA disclosure to the extent the communications were "prepared, owned, used, in the possession of or retained" by the body itself in performance of a public function.

B. "Public Record" FOIA Requirement.

The parties also disagree as to whether documents or records contained upon a private device or server controlled by a public official constitute "public records" for the purposes of FOIA. As stated above, FOIA defines *public record* as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software."⁶ FOIA was not intended to render all personal emails public records simply because they are captured by a public computer system's storage mechanism as a matter of technological convenience.⁷ For instance, in *Howell*

⁵ *Blackwell v. City of Livonia*, 339 Mich. App. 495, 505 (2021).

⁶ MCL 15.232(i).

⁷ See *Howell Educ Ass'n MEA/NEA v Howell Bd of Educ*, 287 Mich App 228 (2011).

Education Association, a union whose members were employees of a public body sought to block the release of personal email records involving three of their members and an MEA member. The union argued that the emails related to union business and were not “public records” for purposes of FOIA. The court found that for the emails at issue to be public records, they must have been stored or retained by defendants *in the performance of an official function*. The court went on to recognize that “unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee.”⁸

Following the *Howell Educ Ass’n MEA/NEA* decision, the Court of Appeals also held that handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any meetings, and retained or destroyed at his sole discretion are not public records subject to disclosure under FOIA.⁹ The court focused on whether the notes met the definition of *public record* in the context of being “taken in the performance of an official function.”¹⁰ In making its ruling, the court took into consideration that the trustee had sole control over the notes, did not use the notes in the performance of an official function, did not refer to the notes for substantive decision-making purposes during future board meetings or during discussions with citizens, and had a personal habit of taking notes to help him remember things.

Similarly, In *Blackwell v City of Livonia*¹¹ plaintiff sought inbox communications sent to a private Facebook account of the mayor of Livonia. The Court of Appeals found that although the office of the mayor falls within the definition of *public body* under MCL 15.232(h), the Facebook account at issue was not maintained or used by the office of the mayor in the performance of an official function. Therefore, the inbox messages for that account were not public records, as

⁸ *Id.* at 237 (quoting *Kestenbaum v Michigan State Univ*, 414 Mich 510, 539, 327 NW2d 783 (1982)).

⁹ *Hopkins v Township of Duncan*, 294 Mich App 401 (2011).

¹⁰ *Id.* at 410.

¹¹ 339 Mich App 495 (2021).

defined in MCL 15.232(i), because they were not “prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.”¹²

Taking these cases together, the Court concludes that the mere fact that an individual is a county or local official, alone, is insufficient to render every communication he or she makes subject to a FOIA disclosure. Indeed, the essential question has less to do with where the documents which are the subject of the FOIA request were stored, and more to do with whether the documents (to the extent they exist at all) were created by a public body *in the performance of an official function*. Plaintiffs’ assertion that the mere allegation that private device has been used by a member of a public board or commission automatically subjects those devices and their communications to FOIA disclosure represents an expansion of FOIA which well exceeds the scope of the Act in current practice, and which may also implicate questions of privacy. Similarly, Defendants’ blanket assertion that “[i]nstant messaging communications found on personal cell phones are not ‘public records’” places a restriction on FOIA which is not present in Act, and which would create a dangerous loophole that could be easily exploited by unscrupulous officials.

After consideration of all the briefs and relevant case law, the Court concludes that The Ottawa County Officers Compensation Committee and the Ottawa County Commission are both “public bodies” under the plain meaning of FOIA. However, the *individual members* of those county bodies, including Lynn Johnson, Gretchen Cosby, Lucy Ebel, Joe Moss, Kyle Terpstra, Rebekah Curran, Sylvia Rhodea, Roger Belknap, and Allison Miedema, are *not*. Any private communications by these members can only constitute a “public record” subject to FOIA

¹² The Court notes that Plaintiffs requested that the Court consider the Unpublished Court of Appeals Decision in *Progress Mich v Palmer*, which was decided on June 9, 2022. However, a copy of the decision was not attached to Plaintiff’s motion. Per MCR 7.215(C)(1), an unpublished decision is not precedentially binding, and such cases should not be cited for propositions on which there is published authority. Moreover, where such cases *are* cited, it is a requirement under that rule that a copy of the decision “to the court and to opposing parties with the brief or other paper in which the citation appears.” In this case, Plaintiffs did not provide a copy of the decision. Therefore, the Court is entitled to disregard this decision under the Michigan Court Rules, and does so here. However, the Court does not believe this decision, to the extent it had been properly placed before the Court, would have altered it’s ruling on this Motion.

disclosure to the extent the communications were “used” by the body itself in performance of a public function. The Court interprets this term to mean that the communications in question must have 1) served as the basis for a for a decision of that public body itself, or 2) have been circulated between two or more members of a single board/committee contemporaneously with the action or decision being made by the board and concerning a matter which was then being decided by that board.¹³

CONCLUSION AND ORDER

For these reasons, the Court finds that neither party is entitled to summary disposition at this time, and that resolution of this case requires the parties to engage in discovery, with an eye towards a potential *in camera* review of any documents potentially responsive to these requests, if any. Therefore, it is **ORDERED** that the parties shall have 90 days from the entry of this Order to conduct discovery. It is further **ORDERED** that the Ottawa County FOIA Coordinator shall do the following;

1. Within 14 days of the entry of this Order, Contact Lynn Johnson and ask him to review his private devices for any text messages or emails sent or received on May 28, 2024 between the hours of noon and 5:00 P.M. that are related to any of his activities as a member of the Ottawa County Officers’ Compensation Commission. If Lynn Johnson responds that he possesses responsive documents, the Ottawa County FOIA Coordinator shall ask that copies of the responsive documents be promptly turned over to them.
2. Within 14 days of the entry of this Order, Contact Gretchen Cosby, Lucy Ebel, Joe Moss, Kyle Terpstra, Rebekah Curran, Sylvia Rhodea, Roger Belknap, and Allison Miedema and ask them to review their private devices for any instant messaging communications (including but not limited to Teams, Jabber, WhatsApp, Telegram, and Signal) which were sent or received by

¹³ The Court will, however, entertain supplemental briefing from the parties on this subject in advance of any *in camera* review.

them between the dates of October 24 and October 25, 2023 and which are regarding their official duties as members of the Ottawa County Board of Commissioners. If these individuals respond to the above requests and confirm that they have responsive documents, the Ottawa County FOIA Coordinator shall ask that copies of the responsive documents be promptly turned over to them.

- 3. Within 28 days of the entry of this Order, Defendants shall provide the Court and Opposing Counsel with a report certifying that the FOIA Coordinator has complied with this Order, and advising the Court whether each of the above-named individuals have, 1) acknowledged their requests; 2) responded to the request, and whether that response indicates that the individual possesses responsive material; and 3) whether the FOIA Coordinator has obtained copies of the responsive material, if any.

Finally, the Court will set this matter for a status conference on *Monday 4/14/2025 at 3:00PM*

The Court will allow both parties to file supplemental briefing on the subject of what documents or communications can be considered "used" by a county commission or body within the meaning of MCL 15.232(i), provided those briefs are filed with the Court at least seven (7) days before the status conference. Unless a party seeks leave, these briefs are limited to ten (10) pages.

IT IS SO ORDERED AND ADJUDGED.

Date: 2/21/25

Margaret Zuzich Bakker
Margaret Zuzich Bakker, Circuit Judge

PROOF OF SERVICE

I certify that on this date the above parties were personally served, or mailed by ordinary mail, a copy of this ORDER.

2/26/2025
Date

[Signature]
Signature